

**Subject:** The CDC Public Health Law News, Wednesday, November 3, 2004



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From the Public Health Law Program, Office of the Chief of Public Health Practice, CDC

<http://www.phppo.cdc.gov/od/phlp/>

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**\*\*\* The Weekly Reading (Number 11):** *People v. Strautz* (see below). This is the eleventh of 26 installments in our series of illustrative readings in public health law. For links to past readings, visit our web site at <http://www.phppo.cdc.gov/od/PHLP/PHlawreadings.asp>.

**\*\*\* Save the Date: Annual Public Health Law Conference.** Plan to attend the next annual public health law conference on June 13-15, 2005 in Atlanta. The conference, entitled The Public's Health and the Law in the 21st Century: 4th Annual Partnership Conference, will be convened by the CDC Public Health Law Program, the American Society of Law, Medicine & Ethics, the Public Health Law Association, and additional partners. The conference is for all who are interested in public health law -- public health practitioners, elected officials, attorneys, law enforcement officials, judges, researchers, educators, and others. For more information or to register, visit [https://www.aslme.org/aslmesecure/register/step1.php?conf\\_id=57](https://www.aslme.org/aslmesecure/register/step1.php?conf_id=57).

**\*\*\* Congratulations to Margaret Clemens.** Margaret Clemens, a Fellow at the CDC Public Health Law Program, has passed the Georgia Bar Exam. Congratulations, Attorney Clemens!

**\*\*\* Influenza NetConference.** On November 19, 2004, at 12:00 noon ET, CDC will offer a one-hour Influenza Update NetConference to provide clinicians with the latest information on influenza. The focus will be on antivirals. Registration is limited. Visit <http://www2.cdc.gov/nip/isd/fluconference> for more information.

**\*\*\* Emergency Preparedness Conferences.** The International Association of Emergency Managers will hold their 2004 Annual Conference in Dallas, Texas, November 5-11, 2004. This conference will provide a forum for current trends and topics in emergency management and homeland security, including public health and emergency preparedness. For more information, visit <http://iaem.networkats.com/events/Annual/intro.htm>. Region III of the U.S. Environmental Protection Agency will hold an Emergency Preparedness & Prevention Conference in Philadelphia, Pennsylvania, December 5-8, 2004. This conference will address public health issues in managing biological events, and offers a variety of emergency preparedness workshops. Registration information is available online at: <http://www.2004conference.org/attendee.htm>.

**\*\*\* Public Health Emergency Response Guide.** The *Public Health Emergency Response Guide for State, Local, and Tribal Public Health Directors* has been finalized and can now be accessed on the CDC Emergency Preparedness and Response website at [www.bt.cdc.gov](http://www.bt.cdc.gov). A pocket-sized field version of the guide will be available in January 2005.

## States and Localities

1. Kentucky: Few Kentucky inmates will get flu shots
2. Massachusetts: Bay state narrows eligibility for flu vaccine shots
3. New Jersey: County expands vaccine lawsuit
4. New York: LI case on smoking ban could have statewide fallout

## National

5. Market debate over flu vaccine
6. Risks of cigarette smoking could include losing your job
7. U.S. barred from forcing troops to get anthrax shots

## International

8. Public health interventions and SARS spread

## Briefly Noted

Florida flu vaccine · Florida tobacco ruling · Illinois syringe law · New Jersey vaccine law · Washington HIV trial · Chiron class action lawsuit · National disease surveillance · National bio-preparedness · International flu vaccine summit

## Quotation of the Week

Patty Hensley, job-seeker

“Few Kentucky inmates will get flu shots”

Louisville Courier-Journal (10/28/04) Mark Pitsch

<http://www.courier-journal.com/localnews/2004/10/28ky/A1-prisonflu1028-6253.html>

Prison officials in Kentucky say some high-risk prisoners will not receive flu vaccine shots this year. Prison spokesperson Lisa Lamb said the cost of the vaccinations was a deciding factor in the decision. “It will increase the risk of infection and potentially increase medical and hospitalization costs, depending on the severity. But we have a fiscal responsibility to taxpayers and the use of their tax dollars and therefore have to decide what is a reasonable expenditure and what is unreasonable,” she said. The state had ordered 4,500 doses of flu vaccine for the most vulnerable prisoners, but received only 400 doses. A Mississippi pharmaceutical wholesaler allegedly offered to sell the prisons more vaccine at an inflated price. The department refused to pay the \$538-per-vial asking price, and is seeking less expensive vaccine. The state Attorney General’s office is investigating the offer as a price gouging claim. The 400 flu shots the department did receive will be given to 145 medical staff and as many of the highest-risk patients as possible, according to Dr. Scott Haas, medical director for the state Department of

Corrections. Only some of the highest-risk inmates will be vaccinated, a group that includes 190 prisoners age 65 or over, 499 diabetics, and 100 who are HIV-positive.

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2

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“Bay state narrows eligibility for flu vaccine shots”

Boston Globe (10/28/04) Stephen Smith

[http://www.boston.com/news/local/massachusetts/articles/2004/10/28/state\\_narrows\\_flu\\_shot\\_eligibility\\_affecting\\_health\\_workers\\_seniors/](http://www.boston.com/news/local/massachusetts/articles/2004/10/28/state_narrows_flu_shot_eligibility_affecting_health_workers_seniors/)

Massachusetts Public Health Commissioner Christine C. Ferguson has issued an order significantly narrowing the categories of persons eligible to receive flu vaccine in the state this year. Ferguson took the action after learning that Massachusetts would have only about half the vaccine needed to immunize all children and adults in the high-risk categories recommended by CDC. Under the new order, healthy seniors aged 65 to 74 no longer qualify for the vaccine and, among persons with chronic diseases, only those who require regular medical care will get the shot. Ferguson also made younger health care workers ineligible. The new restrictions are significantly narrower than guidelines issued October 3 by CDC. Massachusetts has a huge state-funded vaccine program -- the state buys as much vaccine as California, a vastly larger state. About one million doses will be available this year, about half the number needed for the CDC-defined risk groups. “Demand is very high; people’s concern is very high. So what we need everybody to do is understand that we’re trying to match those at highest need with the vaccine as best we possibly can. And it won’t always be smooth, but it will be fair, and it will be based on need,” Ferguson said. Across the border in New Hampshire, officials have asked physicians to give priority to elderly patients with serious underlying health problems, which means a robust 80-year-old may not get vaccine. “It would have been easier for all of us if CDC had taken their guidelines and further prioritized them, but they didn’t,” said Dr. William Kassler, New Hampshire’s state medical director, who added he did not intend to criticize CDC.

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“County expands vaccine lawsuit”

Gloucester County Times (11/02/04) Denise Jewella

<http://www.nj.com/news/gloucester/index.ssf?/base/news-2/109938696482340.xml>

Officials in Gloucester County, New Jersey may add state and federal health agencies as defendants in their lawsuit against Aventis Pasteur. County officials are suing Aventis for failing to deliver half of the county’s \$212,000 order of influenza vaccine, about 10,000 doses. While most counties in New Jersey had ordered flu shots through the state’s contract with Chiron, Gloucester County had contracted directly with Aventis for 20,000 doses. When Chiron was unable to deliver its flu vaccine, Aventis became the only available source for the shots. Officials say Aventis had assured them that the order would be filled. If officials had known the remaining doses would not arrive, they would have implemented stricter guidelines for flu shots, they said. Freeholder Director Stephen Sweeney said, since the county had its own contract with Aventis, it should not have been included in state and federal efforts to redistribute available flu vaccine in New Jersey. The county has suspended its vaccine program and is seeking a restraining order against Aventis. Representatives for Aventis said the lawsuit is “without foundation” and have filed a motion to move the matter to federal court.

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“LI case on smoking ban could have statewide fallout”

Associated Press (10/31/04) Joel Stashenko

<http://www.newsday.com/news/local/wire/ny-bc-ny--smokingban-challe1031oct31,0,550955.story?coll=ny-ap-regional-wire>

New York state Supreme Court Justice Paul Baisley Jr. has dismissed the fines levied against three Long Island taverns where patrons were seen violating the state’s workplace smoking ban. A Suffolk County Health Department inspector found patrons smoking in the three establishments, and saw no employees challenging the smokers. Judge Baisley ruled that since the inspector wasn’t in the bars when the patrons started smoking, it was unknown whether the owners warned the customers that they were violating the ban, as is required under the law. He also ruled that the smoking ban does not require businesses to deny service to people who are smoking in defiance of the ban. Opponents of the smoking ban hope to use the decision to support their constitutional challenge to the ban in federal court. “I think it helps our case,” said Scott Wexler, Executive Director of the Empire State Restaurant and Tavern Association. Christine Malafi, Suffolk County’s attorney, said she will appeal the Supreme Court ruling to the state’s highest court, the New York Court of Appeals.

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“Market debate over flu vaccine: Some say price caps will worsen shortages; Others say public health concerns justify limits”

Sacramento Bee (11/01/04) Dale Kasler

<http://www.sacbee.com/content/business/story/11286454p-12201634c.html>

While attorneys general in Florida, Texas, and other states prepare to prosecute companies that allegedly tried to price-gouge on flu vaccine, some economists are saying that society should do just the opposite -- allow the price of vaccine to float to market levels. Keeping a lid on prices is wrong, they say, and could make shortages even worse in the long run. “Price rationing (allowing flu shots to be distributed according to price) has some important virtues - it provides incentives for people to find more vaccines,” said Benjamin Zycher, a senior fellow at the Pacific Research Institute in San Francisco, who added that low-income Americans should be offered subsidies so they can afford the vaccine. Free market pricing is the most effective and efficient way to ration a scarce product, according to Michael Bernstein, an economic historian at the University of California, San Diego, who cited the gasoline lines of the 1970s as an unintended side effect of government price caps on gas prices. But others believe flu vaccines are too important to leave to the vagaries of supply-and-demand economics. “I don’t have a problem with a small (price) increase, but a big increase -- a big increase for an essential product for life - - I do have a problem with,” said Robert Smiley, a professor at the UC Davis Graduate School of Management. Medical professionals also balk at price-based rationing. “If you don’t get a gallon of gas, you’re not going to die,” said Dr. Glennah Trochet, the Sacramento County health officer. “Some people could die of the flu.”

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“Risks of cigarette smoking could include losing your job”

The Seattle Times (10/31/04) Shirleen Holt

<http://www.myrtlebeachonline.com/mld/myrtlebeachonline/business/10063736.htm>

Faced with rising health insurance costs and worries about declining productivity, some businesses are refusing to hire smokers, even if they never smoke during work hours. “Some of our people are out in the field every day, and they present an image to the public. [Smoking] is not the image that we want,” said Dieter Benz, an employer in Seattle. Benz’s company uses the honor system when interviewing candidates, but in states that allow it, some companies ask for proof that an applicant is a non-smoker. In Washington, for example, some employers require potential hires to take a nicotine test. Other companies make applicants sign an “affidavit of nontobacco use.” One company warns that it may fire anyone who starts smoking after being hired. According to the Tacoma-Pierce County Health Department, smokers cost employers about \$753 more per year in medical costs than nonsmokers, and miss an average of two more workdays per year. Twenty-nine states have enacted laws that prohibit employers from refusing to hire workers for their private, legal behaviors, such as smoking, drinking, or overeating. Even in those states that do allow selective hiring, few companies have written policies against hiring smokers. But job recruiters say covert bias against smokers is growing, and companies often find ways to discourage employees from smoking.

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“U.S. barred from forcing troops to get anthrax shots”

The Washington Post (10/28/04) Marc Kaufman

<http://www.washingtonpost.com/wp-dyn/articles/A3691-2004Oct27.html>

A federal judge has ruled that the U.S. Defense Department must immediately stop inoculating troops with anthrax vaccine. U.S. District Judge Emmet G. Sullivan said the Food and Drug Administration acted improperly when it approved the experimental injections for general use, concluding that FDA violated its own rules when it approved the vaccine last year. Sullivan said FDA’s approval of the vaccine was invalid because it did not seek necessary public comment. More than 1.2 million troops have received the vaccine under a mandatory vaccine program that began in 1998. Sullivan has banned involuntary vaccination until FDA reviews the vaccine properly, or until the President determines that the normal review process must be waived because of emergency circumstances. Soldiers who refused the vaccine have sometimes been punished or court-martialed. The Department of Defense will review the decision and “pause giving anthrax vaccinations until the legal situation is clarified.” But the Department says it is convinced that the anthrax immunization program is safe, effective, and complies with all the legal requirements.

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“Public health interventions and SARS spread, 2003”

Emerging Infectious Diseases (11/04) David M. Bell and others

<http://www.cdc.gov/ncidod/EID/vol10no11/04-0729.htm>

The 2003 SARS outbreak was controlled largely by traditional public health measures, such as case finding, quarantine, and enhanced infection control. In this study, the authors attempted to evaluate these measures by reviewing scientific literature and surveying members of an informal WHO working group using standardized questionnaires. Ascertaining and isolating case-patients, combined with rapid identification and management of contacts, were highly effective in several countries. In one study in Singapore, rapidly isolating patients after the onset of symptoms resulted in a lower secondary case rate. Quarantine of case contacts was used in most countries and, in some, led to financial and psychosocial stresses, but legal appeals and defiance

of quarantine were rare. Some countries tried to shorten the time between symptom onset and isolation of cases by mass population screenings of skin temperatures, etc., but these programs were of questionable value. Likewise, it was difficult to assess the value of the use of masks, disinfection campaigns, and social distancing measures (canceling gatherings, etc.). Measures to control spread of the virus through international travel varied among countries and were also difficult to assess. Entry screening of travelers at international borders had little value, but exit-screening procedures appeared slightly more effective. In future such outbreaks, interventions to control spread should be based on expert advice from WHO and national authorities. Border interventions should not be allowed to detract from efforts within countries to identify and isolate infected persons, monitor or quarantine contacts, and strengthen infection control procedures in health care settings.

#### **BRIEFLY NOTED**

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Florida: Meds-Stat to stop selling flu vaccine, faces price-gouging suit  
“Drug firm gives vaccine to state”

Sun-Sentinel (10/28/04) Jon Burstein

<http://www.sun-sentinel.com/news/local/broward/sfl-cgouge28oct28,0,3154082.story?coll=sfla-news-broward>

Florida: Court will review ruling that threw out largest jury award ever  
“Florida court to review tobacco ruling”

Associated Press (11/01/04) Catherine Wilson

[http://seattlepi.nwsource.com/business/apbiz\\_story.asp?category=1310&slug=Florida%20Smoke](http://seattlepi.nwsource.com/business/apbiz_story.asp?category=1310&slug=Florida%20Smoke%20rs)  
[rs](http://seattlepi.nwsource.com/business/apbiz_story.asp?category=1310&slug=Florida%20Smoke%20rs)

Illinois: Few people taking advantage of law allowing sale of syringes  
“Syringe law not making an impact”

Chicago Sun-Times (10/27/04) Dave McKinney

<http://www.suntimes.com/output/news/cst-nws-needles27.html>

New Jersey: Health officials elaborate on new vaccine allocation law  
“State won’t reallocate flu shots on hand”

The Record (10/30/04) Bob Groves

<http://www.bergen.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFlZUVFeXkzJmZnYmVsN2Y3dnFlZUVFeXk2NjA2Mjk2JnlyaXJ5N2Y3MTdmN3ZxZWVFRXl5Mg==>

Washington: Trial starts for man accused of intentionally exposing 17 women to HIV  
“Prosecutors lay out case against HIV defendant”

The Olympian (10/26/04) Scott Gutierrez

<http://www.theolympian.com/home/news/20041026/topstories/20988.shtml>

National: Chiron Corp. shareholders file class action suit  
“Chiron faces class action over Fluvirin losses”

Datamonitor (10/25/04)

<http://uk.biz.yahoo.com/041025/241/f599l.html>

National: GAO: Disease surveillance improves, but concerns remain

“National disease surveillance strengthening; syndromic tracking questioned”

Washington Fax (11/02/04) (Subscription required)

<http://www.washingtonfax.com/>

National: Some say flu vaccine crisis is symptom of wider problem

“U.S. ill-prepared to handle bioterror attack, experts warn”

The San Francisco Chronicle (11/01/04) Matthew B. Stannard

<http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/11/01/MNG5E9JRK91.DTL>

International: Meeting will bring flu vaccine makers, nations together to plan

“WHO sets flu vaccine summit meeting to deal with pandemic threat”

Associated Press (10/31/04) Marilynn Marchione

<http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2004/11/01/national0504EST0455.DTL&type=health>

### **PHL NEWS QUOTATION OF THE WEEK**

“I thought that was a way to hide it.”

-- Patty Hensley, a job-seeker in Washington who smoked out the car window on her way to a job interview with a company that required applicants to be non-smokers, describing her attempt to hide her habit. Hensley did not get the job, and she has since quit smoking. Some states, including Washington, allow companies to refuse jobs to smokers [see item 6, above].

### **THE WEEKLY READING: NUMBER 11**

Each week for 26 weeks, the Weekly Reading provides *News* subscribers with an illustrative reading in public health law. In each issue, we post a short description and link to the reading and a quiz question. The readings are selected to provide a basic familiarity with public health law.

Reading 11: *People v. Strautz* (1944). This week we begin a short series of readings on the power of government to restrict the freedom of persons who pose a risk to the health of the public. This is a traditional public health power and it remains crucially important. Even in the modern era, long after the advent of antibiotics and vaccines, there remain situations in which the state must invoke quarantine or other restrictions to control the spread of disease (for a very recent report on the use of quarantine to control the spread of measles in Iowa, see <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5341a3.htm>). In *Strautz*, a case from the World War II era in Illinois, two people accused of prostitution were ordered held at a clinic in order to be examined and treated for venereal disease, as required under Illinois law. The two refused to undergo the tests and filed petitions for writs of habeas corpus. Habeas corpus (“you have the body”) refers to the constitutionally guaranteed right to petition a court for release from illegal confinement by the government. The U.S. Supreme Court has called habeas corpus “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.” *Harris v. Nelson*, 394 U.S. 286 (1969). In *Strautz*, the Illinois Supreme Court had to decide whether to grant the prisoners’ petition for habeas corpus, and whether the statute enabling the detention was constitutionally valid. Again, as in previous readings, the nature of the state’s police power is at the center of the case.

Click here for reading 11: <http://www.phppo.cdc.gov/od/PHLP/docs/Strautz.pdf>

Question on Reading 11 (the answer will be provided in next week's issue): The Court held that it is up to the legislature, not the judges, to decide the wisdom and expediency of measures designed to preserve the public's health using the state's police power, with a few exceptions. What are those exceptions?

Answer from last week's reading. Question: In a 1969 case called *State v. Solomon*, the Vermont Supreme Court held that the state's motorcycle helmet law did not exceed the scope of the state's police power, and did not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This would seem to have foreclosed Benning's attack on the same helmet law 25 years later, because courts are loath to depart from their own precedents (a principle in the law called *stare decisis*, "to stand by that which is decided"). To get around this, Benning tried to distinguish his case from *Solomon*. How did he do this? Answer: Benning attempted to distinguish his attack on the helmet law from *Solomon* on the grounds that *Solomon* was decided solely on federal constitutional grounds, whereas Benning was challenging the law on state constitutional grounds.

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